Supreme Court of the United States

OCTOBER TERM, 1949.

No. 147

NEW JERSEY REALTY TITLE INSURANCE COMPANY,

Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY, and THE CITY OF NEWARK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEE, THE CITY OF NEWARK.

CHARLES HANDLER,
Attorney for Appellee, The City of Newark.

VINCENT J. CASALE,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX.

CITATIONS.

CONSTITUTION OF THE UNITED STATES.

STATUTES.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 147.

NEW JERSEY REALTY TITLE INSURANCE COMPANY,
Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW JERSEY, and THE CITY OF NEWARK,
Appellees.

Appeal from the Supreme Court of the State of New Jersey.

BRIEF FOR APPELLEE, THE CITY OF NEWARK.

Questions Presented.

1. Whether the Supreme Court of the State of New Jersey erred in holding that the tax assessed by the taxing district of the City of Newark on 15% of the paid-up capital and surplus in excess of the total of all liabilities after deducting the assessments against all real estate of the appellant, under 54:4-22 of the Revised Statutes of New Jersey, as amended by Chapter 245 of the Pamphlet Laws of 1938, is a valid excise or indirect tax even though there be included in the calculation of the net worth of the company certain exempt federal securities or their income.

2. Whether said tax under the New Jersey statute violates the Borrowing Clause (Art. 1, Sec. 8, Cl. 2), the Supremacy Clause (Art. VI, Cl. 2), Section 3701 of the Revised Statutes of the U. S. or the Public Debt Act of 1941, as amended (55 Stat. 9, 56 Stat. 190, 61 Stat. 180; 31 U. S. C. A. § 742a).

3. Whether the decision of the Supreme Court of New Jersey is in conflict with the decisions of the Supreme Court of the United States.

Statement.

The appellant is a stock insurance company subject to taxation under the New Jersey Statute set forth on page 3 of appellant's brief, R. S. 54:4-22, as amended by Chapter 245 of the Laws of 1938. R. S. 54:4-22, as it was before the amendment, is set forth in Appendix "A". The appellee, the taxing district of The City of Newark, levied an assessment of $75,700.00 upon the intangible personal property of the appellant, as of October 1, 1944, for the tax year 1945—which is 15% of its net worth—in accordance with the above statute. The appellant contended that the tax imposed was a direct tax upon bonds of the United States and therefore unconstitutional.

The highest court of the State of New Jersey held that the tax imposed was not a direct tax upon such exempt bonds, and that the tax was constitutional. This is an appeal from that decision.

Summary of Argument.

I.

The state power of taxation is unlimited in extent, except as it may be restrained by constitutional provisions. It is the most basic power of government, and the function of this Court is limited, because the restriction that the Constitution places upon the states is extremely limited.

II.

This Court will give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the State, but, of course, will determine the true nature of the tax, where a federal question is involved, by ascertaining its operation and effect. However, the burden is upon one asserting the unconstitutionality of a statute to overcome the presumption of facts supporting constitutionality attaching to all legislative acts. The operation of the tax here is to use net worth as the measure of the tax and its effect is not a direct tax upon exempt government securities, but an indirect tax upon whatever makes up the net worth. It is an excise tax which may be measured by assets or income not subject to direct taxation. The distinction, which is significant, is that between *subject* and *measure*. Also there is no intent in the New Jersey Statute to aim at the bonds of the United States, and the statute has only a casual effect upon them.

III.

The tax involved is not unconstitutional because it is not a property tax upon government securities or their income, and therefore the decisions of the Supreme Court of the United States, cited on pages 18-21 of appellant's brief, do not apply to the instant case. Said cases involve *ad valorem* or direct property taxes and the constitutional principles involved therein are not attacked here nor need to be overruled, as the appellant seems to contend, for the Supreme Court to sustain the New Jersey decision. Those cases are—*McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Osborn* v. *U. S.*, 9 Wheat. 738 (1824); *Weston* v. *City Council of Charleston*, 2 Pet. 499 (1829); *Bank of Commerce* v. *New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1864); *The Bank* v. *The Mayor*, 7 Wall. 16 (1868); *Farmers Bank* v. *Minnesota*, 232 U. S. 516 (1914); *United States* v. *Allegheny County*, 322 U. S. 174 (1944).

IV.

The nature of the tax in this case being such that it is not upon the federal securities but an excise upon a New Jersey corporation, there is no quarrel about established constitutional principles. If the tax is not upon federal securities but upon something else, as here, which is taxable, then the decisions of this court holding federal securities immune from taxation have no bearing upon this case.

A consideration of this Court's decisions in *Home Insurance Co.* v. *New York*, 134 U. S. 594 (1890); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1910); *Miller* v. *Milwaukee*,

U. S. 713 (1927); *Long* v. *Rockwood*, 277 U. S. 142 928); *Macallen Co.* v. *Mass.*, 279 U. S. 620 (1929); *Will-s* v. *Bunn*, 282 U. S. 216 (1931); *Educational Films Corp. Ward*, 282 U. S. 379 (1931); *Lawrence* v. *State Tax Com.*, U. S. 276 (1932); *Schuylkill Trust Co.* v. *Pennsylvania*, U. S. 112 (1935); *James* v. *Dravo Contracting Co.*, 302 S. 134 (1937); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. (1940), do not lead to a conclusion contrary to the find-g of the Supreme Court of New Jersey as to the nature the tax here and its validity under undoubted constitu-nal principals.

ARGUMENT.

I.

The power of taxation by the State is the most basic wer of government and therefore is unlimited in tent, except as it may be restrained by constitutional ovisions.

A state government is exercising the most plenary of vereign powers when it, through its legislative branch, acts laws to raise revenue to defray the expenses of gov-nment and to distribute its burdens justly among those o enjoy its benefits. The Constitution provides no par-ular modes of taxation by the States, and they are left restricted in their power to tax those domiciled within m, except insofar as the Constitution gives the Federal vernment a specific grant of the exclusive power to levy tain limited classes of taxes and to regulate interstate d foreign commerce. The state, of course, must place

the tax upon property within the State or on privileges enjoyed there, and the tax must not be so palpably arbitrary or unreasonable as to infringe the 14th Amendment.

Lawrence v. *State Tax Commission*, 286 U. S. 276 (1932); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940).

This Court, in *Wisconsin* v. *J. C. Penney Co.*, *supra*, speaking through Mr. Justice Frankfurter, explicitly and directly covered this point with the following all-embracing language, on page 44, *et seq.*:

> "The constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."
>
> "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, * * *."
>
> "This analysis is merely a reformulation of the classic approach of this court to the taxing power of the states. *Lawrence* v. *State Tax Com.*, 286 U. S. 280. Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances or even occasional deviations over a long

> course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when State taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the States and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the States within formulas that are not compelled by the Constitution, but merely represent judicial generalizations exceeding the concrete circumstances which they propose to summarize."

There must be maintained the essential freedom of government in performing its functions without unduly limiting the taxing power which is equally essential to both federal and state governments under our dual system, and, in a given case, the tax involved, of one sovereignty may have a remote influence upon the exercise of the functions of government of the other.

This Court said in *Metcalf* v. *Eddy Mitchell*, 269 U. S. 514 (1926), at page 553:

> "In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other."

II.

The decision of the highest court of the State interpreting the statute and finding that this tax thereunder is an excise or indirect tax and not a property tax will be given great weight by this Court in its determination of the nature of the tax, by ascertaining its operation and effect.

This is a cardinal principle adhered to by this Court. In 1879, in *Douglas* v. *Pike County*, 101 U. S. 677, 687, Chief Justice Waite, speaking for the Court, reaffirmed it, saying:

> "The language of Chief Justice Taney, in *Rowan* v. *Runnels*, 5 How. 134, expresses the true rule on this subject. He said, p. 139: 'Undoubtedly, this court will always feel itself bound to respect the decisions of the state courts and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws.' "

Also on the same point is *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113, 119 (1935), but in that case the majority found that the operation and effect of the tax disclosed discrimination against federal securities. No such discrimination, solely by reason of ownership of such federal securities, is found in our case.

Grants of immunity from taxation are strictly construed. *Pacific Co.* v. *Johnson*, 285 U. S. 480 (1932).

Also the burden is always upon one asserting the unconstitutionality of a statute to overcome the presumption of facts supporting constitutionality attaching to all legislative acts. *Lawrence* v. *State Tax Commission, supra.*

From a reading of the statute here involved there was no avowed purpose to tax federal bonds or their income directly. In fact, in the formula part of the statute, non-taxable property and property exempt from taxation is expressly excluded (R. 24). It is in the proviso that the assessment calculated under the formula shall in no event be less than 15 per cent of the net worth, and it was under that proviso that the instant tax was assessed. Therefore, net worth being the ultimate measure of the tax here, it was an excise or indirect tax. The most that can be said here is that there was an indirect unintentional effect upon federal instrumentalities and no undue burden upon them. Nor can it be said that this statute was passed for the very purpose of including exempt securities in the measure of the excise.

The former statute (Appendix "A"), which was in force until this statute was passed in 1938, provided for an assessment upon the *full amount* of the capital stock paid in and accumulated surplus. It might be well to interpolate here that a comparison of said former statute and the 1938 amendment indicates that the latter was in the nature of a concession to such insurance companies to reduce their taxes, not to relieve them from taxation, as was the claim in the return filed with the taxing district of the City of Newark (R. 6), the petition of appeal to the Division of Tax Appeals (R. 4), and to the Essex County Board of Taxation (R. 5), all for the tax year 1945, as of the taxing date October 1, 1944. The present statute was conceded by them to be valid from 1938 till 1945, because no attack was made against it until this one by a single insurance company. In this regard there is appropriate language by the high-

est court of New Jersey, in *State Board of Assessors* vs. *Central R. R. Co.*, 48 N. J. L. 146 (1886), where the court said:

> "The fact that railroad property, when the Act of 1884 was passed, had been separately taxed under similar legislation, both for state and local purposes, and *for so many years, and that the validity of such legislation on the ground of unconstitutionality had not been brought to any judicial test, although immense interests in the hands of vigilant guardians had been annually affected by it, is an important circumstance in the consideration of the question now before the court.*"

It must be evident that if the decision of the Supreme Court of New Jersey is not upheld, it will work financial havoc with the tax structure of the City of Newark. In this small insurance company alone, the assessment would drop from $75,700.00 to about $6,700.00. See note at bottom of page 9 of appellant's brief.

The City of Newark therefore respectfully urges this Court to apply economic realism in upholding constitutionality here, as there is no effect seriously adverse to the Federal Government in this indirect tax. Ordinarily, this Court will look at the effect of the tax upon the Federal Government, not upon the appellant corporation. Every change in the taxing methods of a state affects in some degree the federal borrowing power, but it would be unwise to economically hamper a state by forbidding all legislation having such incidental consequences. Only such taxes as bear directly upon federal instrumentalities should be condemned.

The New Jersey statutes in effect on October 1, 1944, are the only ones to be considered on this appeal; therefore, subsequent enactments set out in the body of appellant's brief and in its Appendix "A" are immaterial to the issue.

It is respectfully contended that the appellant has not overcome the presumption of constitutionality.

Since the appellant sets forth in the Transcript (R. 19) and its brief mentions the opinion of the former New Jersey Supreme Court, which was reversed by the present Supreme Court of New Jersey (R. 24, *et seq.*), now the highest Court in the State (having superseded the former Court of Errors and Appeals), we desire to point out, in passing, that the former New Jersey Supreme Court did not cite any decision of the Supreme Court of the United States in its opinion.

III.

The decisions of this Court declaring unconstitutional State ad valorem or direct property taxes upon an instrumentality of the Federal Government have no application to this excise or indirect tax levied upon a subject within the State's power, which is measured in part by elements themselves exempt from State taxation.

We find no fault with the principles set forth in Point I of the Argument in Appellant's Brief, and the cases cited, beginning with *McCulloch* v. *Maryland*, *supra*, that a statute which taxes, without any consent of Congress, bonds issued by the United States, infringes the Borrowing and

Supremacy Clauses of the Federal Constitution. In our case we have no such direct property tax. Furthermore, the tax in question, not being a direct property tax, does not violate Section 3701 of the Revised Statutes of the United States, nor the Public Debt Act of 1941, as amended.

The cases cited in Appellant's Brief, under Point I, p. 18-21, do not have to be overruled by this Court, as the Appellant contends, if it decides to affirm the judgment below.

By necessary implication from the Constitution, the States have not been allowed to tax federal instrumentalities. The doctrine was first enunciated by Chief Justice Marshall in *McCulloch* v. *Maryland* in 1819. It was followed by *Weston* v. *City Council of Charleston, supra,* involving a tax on government stock, *Bank of Commerce v. New York, supra,* and *Bank Tax Case, supra,* both involving a tax upon corporate capital. In these and other cases, a State attempted to levy a non-discriminatory tax on a subject matter not within its sovereignty.

After the Civil War, a distinction was drawn between a tax levied upon a federal instrumentality, and a tax levied upon a subject within the State's power, which was measured in part by elements themselves exempt from state taxation. So in *Society for Savings* v. *Coite,* 6 Wall. 594 (1868), a state was allowed to measure by deposits its tax for the privilege of exercising corporate functions; in *Hamilton Co.* v. *Mass.,* 6 Wall. 632 (1868), by capital excess; in *Home Ins. Co.* v. *New York,* 134 U. S. 594 (1890), by capital stock; in *Plummer* v. *Coler,* 178 U. S. 115 (1900), to determine the tax upon the privilege of inheritance by the deceased's total property; and in *Van Allen* v. *Assessors,* 3

Wall. 573 (1866), to assess stockholders in proportion to the full value of their shares. In each of these cases the tax was larger because in its computation either the principal of, or the interest on, federal securities was included.

This line of cases which sustained the validity of excise taxes measured by elements protected under the federal instrumentality doctrine was further confirmed, when, conversely, it was held in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1910), that the Federal Government could levy upon corporations an excise tax measured by net income, including income from tax-exempt state securities.

The present case, where the excise is measured by net worth, is similar to and is sustained by this line of cases.

A perusal of the mandate of reversal in this case (R. 28), which affirmed the tax, and a study of the opinion of the Supreme Court of New Jersey (R. 24-28), upon which it is based, indicates that the court upheld the constitutionality of the statute and the tax thereunder in conformity with the decisions of this court, which are cited in the opinion. As we said before, the opinion, upon which the judgment which it reversed was based, did not cite even one decision of this Court in its favor.

The contention in Appellant's Brief against the validity of the decision here under appeal must fall if the opinion properly concluded "that the tax levied under this statute is not an *ad valorem* tax or property tax, but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income." (R. 26). When it says, on page 26 of its brief, that there is a close similar-

In *Miller* v. *Milwaukee, supra,* a state was forbidden to tax so much of a stockholder's dividends as corresponded to the corporate income not previously assessed, because there was discrimination against income which had its source in interest paid by the United States. The Court said that

> "A tax very well may be upheld as against any effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim."

There was no such intent or aiming at Federal securities, that is, no discrimination, in our case.

In *Long* v. *Rockwood, supra,* this Court held that income from patents is immune from direct taxation by a state. This was a direct tax, and so differs from our case.

Then came the case of *Macallen Co.* v. *Mass., supra,* in which this Court, under the special facts there disclosed, ruled that the inclusion of income from Federal bonds in the measure of a franchise tax resulted in the imposition of an unconstitutional burden upon a Federal instrumentality. This Court found that the statute attacked was passed "for the very purpose" of including such income. There are no such special facts or express purpose in the statute here under attack, as a reading of it and the prior statute (Appendix "A") which it amended, readily discloses.

It is important to note that in the *Macallen* case this Court expressly recognized the binding authority of *Flint* v. *Stone Tracy Co.* and *Home Insurance Co.* v. *New York, supra.*

In *Willcuts* v. *Bunn*, *supra*, this Court held that immunity from taxation does not extend to the profits derived by their owners from the sale of government bonds. The Court said there:

> "The power to tax is no less essential than the power to borrow money, and, in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government."

The above applies aptly to our case.

Shortly after, in 1931, came the case of *Educational Films Corp.* v. *Ward*, *supra*, which held that where a franchise tax measured by entire net income was imposed upon a domestic corporation, income derived from royalties for the use of copyrights was properly included within the measure. The *Macallen* case can be distinguished from the above case, because in the Macallen case the State specifically excluded income from Federal bonds and then by amendment excluded the prior specific exclusion, while in the above case the State by its original statute made no mention of income from Federal bonds, so that there was no discrimination, because the statute imposing the tax used general terms and made no specific reference to such income from Federal bonds.

An analytical discussion of these cases and their impact upon the constitutional considerations involved in the broad doctrine of inter-governmental relations, was given an ex-

ity here with the *Bank of Commerce* line of cases, it loses sight of the difference between a direct tax upon corporate capital and an indirect tax measured by corporate capital. And when it says that in the opinion below the court spelled out a property tax, and not an indirect tax, it shows that it tried to distort the meaning of certain words taken by themselves and not considered as part and parcel of the entire wording of the entire opinion. The opinion is explicit that the tax is not a property tax. Irrespective of what appellant says about the operation of the proviso, the terms of the statute, the context and scheme of the statute, and the administration of the statute, the highest court of New Jersey has spoken clearly on these matters. This Court will, we believe, decide that it has spoken correctly according to the decisions of the highest court in the land. Contra to the logical interpretation, the appellant, on page 27, says that, "The tax, when levied, is based not on income, but solely on a valuation of property." Nothing could be further from the truth and the facts here, because the tax is measured by wealth and the 15% is the floor. Also the tax does not depend on whether the capital and surplus was comprised of exempt or non-exempt intangibles.

The statute was not couched in the happiest of terms, but that did not make it impossible for the court below to properly construe it and find its true meaning. As this Court said, in *Lawrence* v. *State Tax Commission*, *supra*:

> "* * * in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it."

What the appellant tries to deduce from the context and position of the statute in the Revised Statutes of New Jersey is not dispositive of its true nature. The position in the text does not make it a property tax, if, in fact, as here, its actual meaning and effect show it to be an indirect tax. As this Court said, in *Pacific Co.* v. *Johnson*, 285 U. S. 480 (1932):

> "But we do not rest our decision upon any narrow distinction as to the precise form of words which may be employed in a taxing statute, or the particular order in which its provisions are incorporated in the statute. * * *."

Of course, as stated before, New Jersey statutes enacted after October 1, 1944, have no place in this discussion.

The contention made in Appellant's Brief as to how the statute seemed to be regarded by its administrators or the former Supreme Court is entirely beside the point now that the highest court of the state has finally decided that this is not a property tax but an indirect tax. That court gave the final say as to its nature in New Jersey.

The court below in its opinion properly characterized this situation when it said (R. 26, fol. 36):

> "As we read R. S. 54:4-22, as amended, it does not tax the capital or surplus as such. The proviso in the statute simply fixes a floor below which the assessment under the formula is not permitted to go. In the operation of the formula an assessment in excess of 15 percent of the sum of paid-up capital and surplus is possible and when so found is taxable at the local rate. However, when a minus sum is the result of the operation of the formula, then the as-

sessment is recalculated and the exclusions and deductions are accordingly reduced so as to produce an assessment against the intangible property which is not less in amount than 15 percent of the paid-up capital and surplus."

And further (R. 26, 27, fol. 37):

"While it is true that the legislature authorizes that certain property shall be excluded and exempted from the assessment and also permits certain other deductions and that our legislature, in the exercise of its reserve power, may alter or change any and all such items, they are not at the point of assessment fixed factors in the arithmetical taxing formula but are variable factors, because the legislature went one step further by the proviso which authorizes that these (fol. 37) various items shall be accordingly reduced with the ultimate purpose to produce an assessment of the net worth of all the intangible property of the insurance company which in the aggregate may not be less in amount than 15 percent of the paid-up capital and surplus as defined by the statute. The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but it can not be less in amount than 15 percent of the paid-up capital and surplus."

Then finally the Court said (R. 27, fol. 38):

"The statute is not designed to tax capital or surplus as such or any assets alleged to be included therein."

So there was not any question of forbidden discrimination involved.

IV.

Where the tax is not upon Federal securities or their income but is an excise or indirect tax upon a corporation, the recognized constitutional principles are not in issue, because there is no constitutional impediment in such a case to the State's exercise of its taxing power.

There remains to be considered if any of the decisions of this Court, in the cases mentioned by name under *IV* of Summary of Argument, *supra*, page 4, affect, adversely, the finding of the court below as to the nature of the tax here and its validity under undoubted constitutional principles.

If, as we contend, the tax now before the Court is not a tax on Federal securities or their income, then those securities and income are not taxed, and the question whether they are taxable is not involved. It is only the nature of the tax which is at issue here, whether or not it is under a *power possessed* by the State upon a legitimate subject of taxation. If it were under a *power denied* to the State, as it would be if it were a property tax, then only would it be unconstitutional.

The cases mentioned, which we will discuss now, do not call for a reversal of the Court below, but an affirmance.

Home Insurance Co. v. *New York*, *supra*, and *Flint* v. *Stone Tracy Co.*, *supra*, belong to that line of cases holding that it is within the powers of a state to enact a tax upon exercising corporate privileges which may be measured by assets or income not subject to direct taxation. Ours is an excise case.

haustive presentation by the now Professor Emeritus Powell, who was professor of Constitutional Law at Harvard Law School, in 44 Harv. L. Rev. 889 (April 1931).

In *Lawrence* v. *State Tax Com., supra,* this Court held a state income tax valid which included income earned from sources outside the state in determining his taxable income, while excluding it in determining the taxable income of domestic corporations, where there is nothing to negative the possible existence of just ground for the difference. The Court said as to the nature and operation of the tax which is more important than its name:

> "It is enough, so far as the constitutional power of the State to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on."

In *Schuylkill Trust Co.* v. *Penna., supra,* this Court held that the tax discriminated against Federal securities, under the facts in the case.

In *James* v. *Dravo Contracting Co., supra,* this Court held an occupation tax measured by gross income is not invalid where imposed by a State upon a contractor with the United States, as levying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the government of the work contracted to be done. The tax was not a direct one laid upon the contract of the government. There was no direct interference with or burden upon the exercise of a federal right. That is the situation in the instant case. To paraphrase the significant language of Chief Justice Hughes, taxation by

either the state or the federal government affects in some measure the cost of the operation of the other. As neither government may destroy the other or control in any substantial manner the exercise of its powers, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum interference each with the other, and that limitation cannot be so varied or extended so as to seriously impair either the taxing power of the government imposing the tax or the oppropriate exercise of the functions of the government affected by it.

Conclusion.

The judgment of the Supreme Court of New Jersey should be affirmed on the ground that the tax involved is constitutional, being upon a legitimate subject, measured by net worth, without any discrimination against Federal bonds or income.

Respectfully submitted,

CHARLES HANDLER,
Attorney for Appellee,
The City of Newark.

VINCENT J. CASALE,
Of Counsel.

Dated: November , 1949.

Appendix "A".

R. S. 54:4-22:

"Every fire incurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus. The real estate belonging to every such corporation shall be taxed in the taxing district where situated, and the amount of assessment upon the real estate shall be deducted from the amount of any assessment upon the capital stock and accumulated surplus. No franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."